Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-1844-00
JSRubinstein
PLDarcy

date:

to: Chief, Examination Division, Manhattan
Attention: Harold Shapiro, Team Coordinator

from: District Counsel, Manhattan District, New York

subject: ███████████████

Consent to Extend the Statute of Limitations on Assessment

EARLIEST STATUTE OF LIMITATIONS EXPIRES ███████████████.
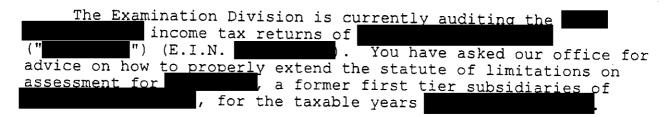
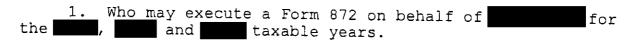UIL Nos.   6501.08-00
            6501.08-10
            6501.08-17

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INTRODUCTION:

The Examination Division is currently auditing the ████ ███████████ income tax returns of ███████████████ ("███████") (E.I.N. ███████████). You have asked our office for advice on how to properly extend the statute of limitations on assessment for ███████████, a former first tier subsidiaries of ███████████████, for the taxable years ███████████.

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ISSUES:

1. Who may execute a Form 872 on behalf of ██████████ for the ████, ████ and ████ taxable years.

2. What specific language should be used in the caption on the Form 872 for ████████?

CONCLUSION:

We conclude that ███████████████████████████ (E.I.N. ████████), as ████████'s successor in interest, may execute the Form 872 on behalf of ████████. Furthermore, the caption of the Form 872 extending the statute of limitations for ████████'s ██████████████████ taxable years should read as follows:

"███████████████████ (E.I.N. ██████████), as successor in interest to ████████████████████ (E.I.N. ██████████)."

FACTS:

████████████ was a Delaware corporation incorporated on ████████. ████████████ is a Delaware corporation incorporated on ████████████████████. ████████████████████ is the sole shareholder of both companies and was the sole shareholder of ████████. During the years at issue, ████████ and ████████████ made an election for the Puerto Rico and possession tax credit provided under Internal Revenue Code § 936(a). Pursuant to I.R.C. § 1504(b)(4), neither ████████████ nor ████████████ were included in the Consolidated Federal Income Tax returns filed by ████████████████.

On ████████████, ████████ and ████████ (collectively referred to as "Constituent Corporations") entered into an Agreement and Plan of Merger pursuant to Section 251 of the General Corporation Law of the State of Delaware. The Agreement and Plan of Merger provided that the Constituent Corporations deem it advisable and in their best interest for ████████ to be merged with and into ████████ with ████████ as the surviving corporation, and the separate existence of ████████ shall cease. Accordingly, ████████ no longer exists as a viable entity.

DISCUSSION:

As a preliminary matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the extension, and IRM 4541.1(8) requires use of Letter 929(DO) to

return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, please note that Section 3461 of the Restructuring and Reform Act of 1998, codified in Section 6501(c)(4)(B), requires Internal Revenue Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Internal Revenue Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Pub. 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the Form 872. Alternatively, you may advise the taxpayer orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document your actions in this regard in the case file.

1.   Who May Execute A Consent to Extend The Statute Of
      Limitations On Behalf of ███████████

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment. For corporate income taxes, the form used by the Service to extend the limitations period on assessment is Form 872.

███████████ did not file its returns as part of a consolidated group and, therefore, the consolidated return regulations (Treas. Regs. § 1.1502-1 et seq) do not resolve the issue at hand. See I.R.C. § 1502 (requiring the Internal Revenue Service to prescribe regulations concerning the tax liability of any affiliated group of corporations making a consolidated return).

In this case, who has the authority to execute a Form 872 on behalf of ███████████ is determined by Delaware state law. See

e.g., <u>Pleasanton Gravel Co. v. Commissioner</u>, 85 T.C. 839 (1985); <u>Lesser v. Commissioner</u>, 47 T.C. 564, 591 (1967). Section 259 of the General Corporation Law of the State of Delaware grants the surviving corporation in a merger the authority to act on behalf of the merged corporation. Thus, in this case, ████████ has the authority to execute a Form 872 for ████████'s pre-merger taxable years. Therefore, an officer of ████████ may execute a Form 872 on behalf of ██████ for the ████ through ████ taxable years.

2.   <u>What Specific Language Should Be Used In The Caption Of the Form 872 for</u> ████████

The Form 872 should clearly comport with the facts of this case. Accordingly, the caption of the Form 872 extending the statute of limitations for ████████'s ████ through ████ taxable years should read as follows:

"████████████████ (E.I.N. ██████████), as successor in interest to ████████████ (E.I.N. ██████████ *."

In addition, at the bottom of the page, you should add the following language:

"*This agreement is with respect to the income tax liability of ████████████████ (E.I.N. ██████████ for the taxable years ████ through ████.

   Should you have any questions regarding this matter, please
contact Jody Rubinstein at (212)264-1595, ext. 235 or Paul Darcy
at (212) 264-5473, ext. 256.

                                    LINDA R. DETTERY
                                    District Counsel

                          By: _____
                                    PETER J. LABELLE
                                    Assistant District Counsel

Noted:

_____
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District Counsel

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